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No. 07-1226

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In The

Supreme Court of the United States

WAYTEC ELECTRONICS CORPORATION,

Petitioner,

v.

ROHM AND HAAS ELECTRONIC MATERIALS, LLC, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals was Required to Remand this Case to State Court After Trial on the Merits and Entry of Final Judgment in Federal Court Where the District Court Found no Defect in Removal, Any Alleged Defect in Removal was Procedural and Governed by the District Court's Electronic Filing Rules, and the Federal Court had Subject Matter Jurisdiction At All Times?

RULE 29.6 STATEMENT

Rohm and Haas Electronic Materials, LLC is not a publicly held corporation. Rohm and Haas Electronic Materials, LLC is a subsidiary of Rohm and Haas Corporation, which owns 10% or more of the corporation's stock.

Northern Laminate Sales, Inc. is not a publicly held corporation and has no parent or publicly held company owning 10% or more of the corporation's stock.

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BRIEF IN OPPOSITION

Pursuant to Rule 15 of the Rules of the United States Supreme Court, Rohm and Haas Electronic Materials, LLC ("Rohm and Haas") and Northern Laminate Sales, Inc. ("NLS") file this Brief in Opposition to the Petition for Writ of Certiorari filed by Waytec Electronics Corporation ("Waytec").

STATEMENT OF THE CASE

A. Procedural History

Waytec Electronics Corporation ("Waytec") instituted this action against Rohm and Haas Electronic Materials, LLC ("Rohm and Haas"), and Northern Laminate Sales, Inc. ("NLS") by filing a Motion for Judgment in the Circuit Court for the City of Lynchburg, Virginia, seeking damages in the amount of $10,000,000. Waytec alleged actual and constructive fraud, breach of warranties, negligence, and conspiracy. The crux of the action was the allegation that Defendants' Copper Gleam PPR product was defective, and caused cracking in circuit boards that Waytec manufactured.

On July 20, 2005, Defendants timely removed this case to the United States District Court for the Western District of Virginia, Lynchburg Division, by electronically filing a Joint Notice of Removal.

(App. 61a).[1] Waytec argued that the removal was defective because the electronic signature of NLS' counsel did not comply with 28 U.S.C. § 1446 or the Western District of Virginia's electronic filing rules. (App. 67a). The removal question was briefed by the parties, and a hearing was held on August 10, 2005. (App. 115a).

By Memorandum Opinion dated September 2, 2005, the district court rejected Waytec's argument, and held that the Joint Notice of Removal satisfied the statutory removal requirements as well as the Western District's electronic filing rules. (App. 13a-21a). The district court specifically found that Defendants "complied with the District's electronic filing requirements and both [defendants] signed the July 20 notice of removal within thirty days of service, as required by 28 U.S.C. § 1446(b)." (App. 21a).

Following an extended discovery period, Defendants moved for summary judgment, contending that Waytec could not prove fraud or causation, and that Defendants had disclaimed all warranties and certain damages. (App. 5a-6a). Based upon the summary judgment submissions, the district court "discerned scant, if any, evidence of fraud and only tenuous evidence of causation." (App. 25a). The district court essentially took the motion for summary judgment

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[1] References to the Appendix contained in the Petition for Writ of Certiorari will be denoted "(App. __)."

under advisement, permitting trial in stages with the fraud claim being tried first. (App. 6a, 26a).

A jury trial on the fraud claim was held on September 21 and 22, 2006, before the Honorable Samuel G. Wilson. At the close of Plaintiff's evidence, the district court granted Defendants' motion for a Rule 50 judgment as a matter of law. On October 25, 2006, the district court issued a Memorandum Opinion memorializing and supplementing its bench ruling. (App. 24a). On the same day, the district court entered judgment as a matter of law in favor of Defendants. (App. 22a). Waytec did not file any post-trial motions, and proceeded directly to appeal.

Waytec raised five questions on appeal to the United States Court of Appeals for the Fourth Circuit ("the Fourth Circuit"). (App. 6a). Only one question challenged the removal procedure. The remaining four questions concerned evidentiary rulings and rulings as a matter of law on the fraud and warranty claims. (App. 6a).

Following oral argument, a panel of the Fourth Circuit issued a *per curiam* unpublished opinion affirming the district court's decision. (App. 1a). The Fourth Circuit subsequently denied Waytec's request for rehearing. (App. 48a).

B. Material Facts

Only those facts relevant to removal will be set forth here.

On June 1, 2005, Waytec filed a Motion for Judgment against Rohm and Haas and NLS in the Circuit Court for the City of Lynchburg, Virginia. (App. 16a). Plaintiff's Motion for Judgment was served on Rohm and Haas on June 7, 2005, and was served on NLS on June 20, 2005. (App. 17a).

On June 29, 2005, Rohm and Haas electronically filed its Notice of Removal with the United States District Court for the Western District of Virginia, Lynchburg Division, indicating its intent to remove the case. (App. 52a). On July 20, 2005, the district court entered an Order and Opinion identifying deficiencies in the Notice of Removal, including the failure to join co-defendant NLS in the Notice. (App. 56a). In its Opinion, the district court ordered Rohm and Haas to "show cause within fourteen (14) days of the date of this Order why this action should not be dismissed for lack of subject matter jurisdiction." (App. 59a).

On the day the show cause was issued, July 20, 2005, Rohm and Haas and NLS filed a Joint Notice of Removal ("Joint Notice") unambiguously setting forth their written consent to jointly remove this case. (App. 61a). The Joint Notice contained separate signature pages, including the valid electronic signature of each party's counsel. (App. 64a). Prior to filing the Joint Notice, counsel for Rohm and Haas and NLS conferred on the content of the pleading, and both counsel reviewed the actual document and approved its filing. (App. 104a-110a). Electronic signatures for both counsel were affixed to the document on

separate signature pages, and Rohm and Haas filed the Joint Notice with the Court's Case Management/ Electronic Case Filing ("CM/ECF") system. (App. 18a).

ARGUMENT

REMAND OF THE CASE WAS NOT REQUIRED WHERE ANY ALLEGED DEFECT IN REMOVAL WAS PROCEDURAL, RATHER THAN JURISDICTIONAL, AND THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION AT ALL TIMES.

Abandoning most of the issues it raised below, Waytec now proceeds solely on its claim that removal was improper.

There is no compelling reason to grant this petition. Waytec concedes that there is no conflict in the circuit courts on the first issue presented – whether remand to state court was required if removal was defective. (Pet. 2).[2] Although all the circuit courts have been uniform in their approach to this issue, (Pet. 2), Waytec incorrectly suggests that the Fourth Circuit's decision conflicts with this Court's law, specifically *Caterpillar v. Lewis*, 519 U.S. 61 (1996) and *Grupo Dataflux v. Atlas Global, L.P.*, 541 U.S. 567 (2004), as well as the removal statutes. (Pet.

[2] References to the Petition for Writ of Certiorari will be denoted "(Pet. __)."

1-2). To the contrary, the decision below does not run counter to the principles articulated in those decisions or to any statute.

Waytec cannot identify any compelling reason for this Court's review as the fact-bound decision whether removal was proper was governed largely by the district court's local electronic filing rules, a realm in which the district court is afforded significant discretion. At its heart, this appeal really challenges the district court's finding that the signatures on the Joint Notice of Removal were valid and complied with the local electronic filing rules. (App. 20a-21a, 67a). Such an issue does not compel exercise of this Court's discretion to review a case on certiorari. This is particularly true here because Waytec has not directly challenged the local rules which form the basis of the district court's refusal to remand the case to state court. Indeed, Waytec's crusade to obtain a new trial in state court has never included a claim that the local rules conflict with federal law or statute. Therefore, the second issue presents no compelling reason for this Court to exercise its discretion to grant certiorari under Rule 10.

A. The District Court Correctly Found that Procedures for Removal Were Satisfied.

Almost as an after-thought, Waytec argues that removal was defective. (Pet. 24). However, the district court decided, as a matter of fact and law, that the case was properly removed from state to federal

court. (App. 15a-21a). Accordingly, the district court's finding resolves what should be the threshold and dispositive question presented to this Court – whether removal was proper.

1. The district court did not abuse its discretion in finding that defendants complied with the local electronic filing rules.

Because the removal notice was filed electronically, the district court also interpreted and applied the Western District of Virginia's electronic filing procedures. The district court's interpretation and application of its internal rules should not be reversed absent an abuse of discretion. *E.g.*, *Macklin v. City of New Orleans*, 293 F.3d 237, 240 (5th Cir. 2002) ("We review the district court's administrative handling of a case, including its enforcement of the local rules and its own scheduling orders, for an abuse of discretion"), *cert. denied*, 537 U.S. 1159 (2003); *Golden v. Oil Screw Frank T. Shearman*, 455 F.2d 133, 135 (4th Cir. 1972) (reviewing for an abuse of discretion the district court's decision refusing to relax a Local Admiralty Rule requiring the filing of exceptions), *cert. denied*, 408 U.S. 924 (1972).

The findings of the district court, which are supported by the record, resolve the question presented to this Court. The Joint Notice of Removal demonstrated that both NLS and Rohm and Haas joined in and consented to removal, as evidenced by their electronic signatures on that notice, placed in

accordance with the Western District of Virginia's electronic filing rules. The district court's interpretation of those procedural rules was not an abuse of discretion.

Waytec's challenge to removal in the district court focused on the Defendants' claimed failure to comply with the filing and signature requirements set forth in the electronic filing rules. Applying the Court's local electronic filing rules, the district court concluded that Defendants complied with those rules:

> Defendants followed the procedures outlined on page twelve [of the electronic filing rules] when they filed the joint notice of removal on July 20. The attorney for Rohm and Haas first confirmed that the content of the document was acceptable to NLS, and then obtained NLS's electronic signature on the document. The attorney for Rohm and Haas then submitted the document electronically to the system by indicating the signatories "s/William R. Rakes," and "s/Kevin P. Oddo." The procedures clearly contemplate that in documents requiring the signature of more than one attorney, one attorney will log into the electronic system and add the electronic signatures of the other attorneys. Only one attorney can log into the electronic system with his or her unique login and password at one time. Therefore, to require *each* attorney to log into CM/ECF every time the attorney needed to sign a jointly-filed document would result in multiple filings of the same document, thus defeating the

> CM/ECF's intended purpose of streamlining the filing system.

(App. 20a).

The district court's findings are supported by the record. On July 1, 2005, within 30 days from the date of service upon its registered agent, Rohm and Haas electronically filed its Notice of Removal with the district court. (App. 52a). On July 20, 2005, within 30 days from the date of service upon NLS' registered agent, Defendants filed a Joint Notice clearly and unambiguously setting forth their written consent to remove this case. (App. 61a). The Joint Notice contained separate signature pages with each parties' counsel's valid electronic signature. (App. 64a).

Further, pursuant to the electronic filing rules, counsel for Rohm and Haas prepared the Joint Notice and sent it by electronic mail to counsel for NLS for his review. (App. 107a, 126a-127a). Counsel for NLS received the electronic transmission, and communicated his assent by electronic mail, attaching his electronic signature thereto. (App. 109a). Electronic signatures for counsel for both parties, which meet the requirements of the local rules, were obtained and set forth on separate signature pages. (App. 64a). Consequently, both Defendants unambiguously indicated their written intent and consent to the removal of this case to this Court through a joint pleading with signatures, as required by the Western District's procedural rules for electronic filings.

Each Defendant plainly voiced its consent to the removal in the Joint Notice. In a word, it was a **joint** notice. Further, there is no dispute that NLS did, in fact, give its consent to the removal and the Joint Notice. (App. 109a). Accordingly, the district court was satisfied that all defendants had registered consent to removal in the Joint Notice.

2. The district court correctly rejected Waytec's argument that NLS did not sign the Joint Notice of Removal, and Waytec offers no basis to disturb this finding.

Waytec's argument that "one party may not properly file or sign a removal notice for another represented party," (Pet. 24), overlooks the Western District's electronic filing rules which, as the district court found, "clearly contemplate the situation at hand." (App. 19a). As the district court correctly found, Defendants satisfied the requirements of the electronic filing rules, and 28 U.S.C. § 1446, by each lodging its consent to the removal with the district court, through the Joint Notice, within 30 days of service. (App. 20a-21a). And, Waytec has never argued that the local electronic filing rules are defective or contravene the removal statutes.

Further, Waytec cites two cases for the proposition that "one party may not properly file or sign a removal notice for another represented party." (Pet. 24-25). These cases are not applicable. The issue in *Business Guides, Inc. v. Chromatic Communications*

Enterprises, Inc., as framed in the first sentence of the decision, was whether Rule 11 "imposes an objective standard of reasonable inquiry on represented parties who sign pleadings, motions, or other papers." 498 U.S. 533, 535 (1991). That case does not resolve any question raised in this appeal.

Nor is help found in the second cited case, *Creekmore v. Food Lion, Inc.*, 797 F. Supp. 505 (E.D. Va. 1992), which predates adoption of the electronic filing rules in the Western District of Virginia. In that case, the notice of removal was not a joint notice, but rather, was filed on behalf of one defendant, who asserted that it had the consent of the other defendant, who had not yet been served. Here, by contrast, the notice of removal was plainly "joint," and was signed by both defendants. Indeed, the district court found *Creekmore* inapposite because, in part, it did not "involve electronic filings and electronic signatures." (App. 19a, 21a).

In short, Waytec's entire appeal fails for the simple reason that removal was proper. There was full compliance with the procedures for removal contained in 28 U.S.C. § 1446, and the signatures on the Joint Notice of Removal conformed to the Western District's electronic filing rules.

B. This Court Does Not Mandate Remand of a Case to State Court on Grounds that the Procedures for Removal Were Defective Where Diversity of Citizenship Existed at the Time of Filing and at the Time of Removal.

1. The Fourth Circuit's decision is consistent with *Caterpillar* and *Grupo*.

Waytec claims that the Fourth Circuit's decision flies in the face of this Court's jurisprudence, especially *Caterpillar* and *Grupo*. As a discussion of these decisions demonstrates, Waytec is wrong.

In *Caterpillar*, a case was improperly removed to federal court at a time when complete diversity of citizenship did not exist among the parties. 519 U.S. at 64. Removal was sought within the one-year period permitted under 28 U.S.C. § 1446(b) based upon a settlement agreement with one of the parties – Whayne Supply – whose absence would create complete diversity. *Id.* at 65. However, at the time of removal, the settling defendant had not been dismissed from the case. *Id.* Although the plaintiff timely moved to remand the case, the district court refused to remand, "treating as dispositive [plaintiff's] admission that he had settled his own claims against Whayne Supply." *Id.* at 66. Prior to trial, the district court dismissed Whayne Supply; the trial resulted in a verdict for Caterpillar, the sole defendant. *Id.* at 66-67. Thus, there was complete diversity at the time of judgment. *Id.* at 67.

On appeal, the Court of Appeals for the Sixth Circuit vacated the district court's judgment on grounds that complete diversity was lacking at the time of removal. *Id.* at 67. This Court reversed, holding that "a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Id.* at 64. The Court found that there were "overwhelming" and "overriding consideration[s]" of "finality, efficiency, and economy" once a diversity case was tried in federal court, and those considerations weighed strongly against remand. *Id.* at 75.

As was explained more recently in *Grupo*, *Caterpillar* stands for the proposition that a "*statutory* defect, namely failure to comply with the requirement of the removal statute," where subject matter jurisdiction is established, does "not require dismissal once there was no longer any jurisdictional defect." *Grupo*, 541 U.S. at 574. The Fourth Circuit faithfully applied *Caterpillar*'s holding. At no time was there an absence of subject matter jurisdiction which would merit remand of the case to state court after a judgment on the merits.

Indeed, the application of *Caterpillar* to this case is even stronger because the district court had subject matter jurisdiction over the case at every stage of the proceeding. Even if Waytec's arguments are believed, the most it proves is that the technical requirements of removal were not satisfied. In *Caterpillar*, by contrast, there was not a mere failure of procedure,

but a failure to establish complete diversity of citizenship at the time of removal, a requirement that implicates the federal court's subject matter jurisdiction.

Moreover, *Caterpillar* involved a plaintiff, who, like Waytec, timely challenged removal in the district court and later raised the issue on appeal. *Id.* at 70-71. Indeed, the *Caterpillar* Court noted that its prior cases did not address the "question whether a plaintiff, who timely objects to removal, may later successfully challenge an adverse judgment on the ground that the removal did not comply with statutory prescriptions." *Id.* at 73. However, the fact that there was complete diversity at the time of judgment, thereby undeniably conferring subject matter jurisdiction on the district court, "cured" the jurisdictional defect. *Id.* at 76-77. Therefore, the fact that the *Caterpillar* plaintiff timely raised and preserved its objection to removal did not alter the outcome of the case. Nor does Waytec's objection alter the outcome of this case because Waytec cannot hang its hat on any jurisdictional defect.

Likewise, *Grupo* does not mandate a remand to state court. That case does not even involve removal, as the suit was filed originally in the federal district court. 541 U.S. at 569. At the time of filing, diversity of citizenship among the parties was lacking. However, diversity was present when the case was tried due to a subsequent partnership transaction. *Id.* A motion to dismiss was filed after trial, but before judgment, on grounds that the district court lacked

subject matter jurisdiction at the time of filing. *Id.* The district court denied the motion and the court of appeals affirmed that ruling. *Id.* at 569-570. This Court reversed, finding that the failure to establish complete diversity of citizenship at the time of filing was a defect depriving the federal court of subject matter jurisdiction that could not be cured under *Caterpillar*, which addressed a "statutory defect." *Id.* at 574-575.

Grupo is wholly distinguishable. It does not address a procedural defect in removal, but rather, a jurisdictional defect where the federal court lacks subject matter jurisdiction at the time of filing because the parties are not diverse. Here, it is undisputed that the district court had subject matter jurisdiction of the parties at the time of filing, at the time of removal, and at the time of judgment. *Grupo*, then, does not support Waytec's appeal.

Consequently, Waytec's broad-sweeping claim that the Fourth Circuit's *per curiam* unpublished decision violates existing removal law is wrong.[3]

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[3] Nor does last year's ruling in *Bowles v. Russell*, ___ U.S. ___, 127 S.Ct. 2360 (2007) support Waytec's position. In *Bowles*, the Court held that the time for filing an appeal from a federal district court to a federal court of appeals was mandatory and jurisdictional. Specifically, the failure to file a timely notice of appeal defeated the appellate court's jurisdiction. *Bowles* does not address the removal statutes or extend its holding to any statute at issue in this case.

2. The Fourth Circuit did not hold that the alleged defect in removal was moot or not reviewable.

Waytec asserts that the Fourth Circuit's holding renders moot, or unreviewable on appeal, district court decisions denying motions to remand cases to state court following removal. (Pet. 15). *Caterpillar* addressed, in dicta, the concerns Waytec raises in this appeal about the alleged unreviewability of district court orders refusing remand.

> Our view is in harmony with the main theme of the removal scheme Congress devised. Congress ordered a procedure calling for expeditious superintendence by district courts. The lawmakers specified a short time, 30 days, for motions to remand for defects in removal procedure, 28 U.S.C. § 1447(c), and district court orders remanding cases to state courts generally are "not reviewable on appeal or otherwise," § 1447(d). Congress did not similarly exclude appellate review of refusals to remand. But an evident concern that may explain the lack of symmetry relates to the federal court's subject-matter jurisdiction. Despite a federal trial court's threshold denial of a motion to remand, if, at the end of the day and case, a *jurisdictional* defect remains uncured, the judgment must be vacated. . . . To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost

> incompatible with the fair and unprotracted administration of justice.

519 U.S. at 76-77 (italics in original). Thus, preserved objections to defects involving the federal court's subject matter jurisdiction will always render a case subject to dismissal. That scenario, however, is not implicated in this case as subject matter jurisdiction has always existed. Therefore, this Court has already considered, and addressed, the very concerns Waytec raises in this appeal, and further discussion by this Court is not necessary.

As a practical point, though, the Fourth Circuit did not actually "moot" the removal question on appeal, as Waytec erroneously suggests. (Pet. 10). In fact, the Fourth Circuit did not even use the word "moot" or otherwise state that it could not review the alleged error. Rather, it simply reached the holding that was dispositive to the issue on appeal – that any defect in removal was procedural, not jurisdictional, and did not warrant remand – without explicitly deciding whether the district court properly interpreted its local electronic filing rules. In short, in light of *Caterpillar*'s holding, it was unnecessary for the Fourth Circuit to decide whether removal was defective.

Contrary to Waytec's suggestion, there was nothing sinister or improper about the manner in which the Fourth Circuit resolved the issue before it. It simply chose to address the dispositive point (whether a procedural defect in removal required

remand to state court) without reaching the underlying question whether removal was procedurally defective. If the federal courts of appeals are required to address each issue on appeal, even if consideration of that issue is not necessary for resolution of the appeal, this Court will be flooded with appeals challenging the method by which appellate courts resolve the issues before them.

C. The District Court had Subject Matter Jurisdiction of this Case.

There is no dispute that there has been complete diversity of citizenship at the time of filing, at the time of removal, and at the time of judgment. Accordingly, the district court enjoyed subject matter jurisdiction of this case at all times. 28 U.S.C. § 1332(a).

Waytec's suit sought in excess of $75,000. (App. 25a). Waytec is a Virginia corporation with its principle place of business in Virginia. Defendant Rohm and Haas is a Delaware company with its principle place of business in Massachusetts; NLS, the other defendant, is a New Hampshire corporation with its principle place of business in New Hampshire. (App. 25a, 62a). Consequently, Waytec's challenge to removal did not, and could not, include any claim that the parties were not citizens of different states. (App. 66a-72a).

Waytec framed its objection to removal as a procedural failure, stating that the Defendants "failed to comply with this Court's Administrative Procedures

for Filing, Singing [sic] and Verifying Pleadings and Papers by Electronic Means, and that defendants have failed to comply with the statutory requirements of 28 U.S.C. § 1446." (App. 67a). Further, Waytec characterized its objection as one of procedure (*e.g.*, App. 69a – "failed to comply with this Court's electronic filing requirements"). Equally important, Waytec did not base its objection to removal on grounds that the district court lacked jurisdiction. (App. 66a-72a).

Therefore, the state and federal court enjoyed concurrent jurisdiction of the case, and it could have been filed in federal court originally. 28 U.S.C. § 1332.

CONCLUSION

Waytec asks this Court to reverse the Fourth Circuit's opinion and remand the case to state court for a second trial. (Pet. 30). However, the Fourth Circuit never reached the question whether removal was defective; it did not have to.

At best, then, Waytec would be entitled only to remand to the Fourth Circuit to decide whether removal was improper, an issue the district court correctly resolved, in large part on the basis of the local electronic filing rules. Because the Fourth Circuit is required to review the district court's application of those local rules for an abuse of discretion and the district court made no mistake in finding removal proper, the outcome on remand to the Fourth

Circuit is certainly predictable – affirmance. The relief Waytec requests, then, cannot be granted.

The relief sought in this case exposes Waytec's true motive – a second chance to prove its case. Waytec failed as a matter of law on each claim it pursued. To use any court's resources to award Waytec a second opportunity to prove its case is simply wrong.

The fact-bound issues presented do not warrant this Court's attention. Accordingly, Rohm and Haas and NLS respectfully urge this Court to deny Waytec's Petition for Writ of Certiorari.

Respectfully submitted,

Rohm and Haas Electronic Materials LLC and Northern Laminate Sales, Incorporated, d/b/a NLS Technologies

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